

subscribers a system serves. Thus, by tailoring rate regulations to the size of a system, this approach meets many of the concerns addressed by the Office of Advocacy.

570. Office of Advocacy next suggests a procedure for considering complaints about cable programming service rates. Office of Advocacy states that the complainant must notify the cable operator of the complaint simultaneously with the Commission, and must demonstrate that a violation of the rate benchmark exists. The cable operator would then show either that the formula was used incorrectly or that other reasons warrant the rate violation. On this basis the Commission would ascertain whether or not a violation exists and is unreasonable. Once that determination has been made, under the Office of Advocacy plan, if other complaints about the same operator are filed, they can be denied by invoking res judicata, absent evidence of a rate increase, because the new petitions would retrace "already trod ground." Or, alternatively, Office of Advocacy says that the Commission could require that any complainant show that the content of their petition has not been ruled on previously by the Commission. The Commission's plan for filing complaints is detailed in paragraphs 330-368. As recommended by Office of Advocacy, the cable operator must be notified of the complaint simultaneously with the Commission. Once the complaint form has been submitted, the Commission will determine whether it meets the minimum showing. If a complainant does make a minimum showing, the cable operator must respond and bears the responsibility for proving that the rate is not unreasonable. The Commission will consider the complaint or complaints and issue a written decision. We agree with Office of Advocacy that any complaint filed against the same operator after the rate is determined to be reasonable, can automatically be dismissed unless new evidence of a violation is provided.

571. Office of Advocacy recommends ways to reduce or eliminate reporting and recordkeeping burdens. It suggests that the Commission utilize recordkeeping and reporting requirements geared to the requirements of the benchmark formulas. Office of Advocacy believes that in this way small systems will be ensured of facing only those information collection requirements appropriate to the benchmark formula. The administrative burden placed on small systems by cable rate regulation is discussed at paragraph 462. The Commission recognizes that imposing an insurmountable paperwork or recordkeeping burden will ultimately have a particularly detrimental effect on the ability of small cable systems to respond to the programming and service needs of their subscribers. Thus, when we establish reporting requirements, we will consider whether to abbreviate them for small cable systems. To further relieve the administrative burden on small systems, the Commission will permit franchise authorities to exempt small systems from the requirement to file an initial rate schedule with the local franchise authority.

However, a small system proposing to increase its basic rates or answering a cable programming service complaint will need to follow any notice and other procedural requirements we establish.

572. Finally, the Office of Advocacy recommends that the Commission delay the effective date of the regulations until all petitions for reconsideration have been addressed. This delay according to Office of Advocacy, would allow time for the Commission, cable operators, and franchising authorities to "study, analyze, and recommend modifications without going through a futile rate regulation process." Office of Advocacy states that a delay would also allow small operators to adjust not only to a set of initial regulations, but to the ensuing modifications. This request should be made as part of a petition for stay when and if reconsideration petitions are filed and satisfy the Commission's requirements for an administrative stay. We deny the Office of Advocacy's request now as premature.

573. Significant alternatives considered and rejected: The Commission considered a number of options before selecting the program for implementing cable rate regulation which we believe offers the best balance of satisfying the requirements and goals of the Act with a minimum accompanying administrative burden on small businesses. In discussing the effect of the decisions made through this action, however, it is important to note that while the Commission has been provided with some flexibility in carrying out the mandate of the Act, the general parameters of how rates are to be controlled are set forth in the Act and in its legislative history. Within these constraints, we have adopted significant modifications to our proposed rate requirements which should ease the burden on small systems as contemplated under the statute. (See, for example Section II.A.(5)(f)). It is also important to note that the regulations adopted today are undoubtedly not the permanent cable rate regulations. In accordance with the statute, the Commission will review and monitor the effect on industry and consumers and refine and improve them as necessary.

574. Commenters representing cable interests and franchising authorities submitted many alternatives aimed at minimizing administrative burdens. The Commission considered such alternatives and tried to accommodate the concerns the suggested alternatives were intended to address. Many such alternatives were reviewed and rejected. Some of these alternatives are discussed above in the Commission's response to the Office of Advocacy's reply to the Initial Regulatory Flexibility Act Statement. For example, we contemplated whether to adopt a cost-of-service approach to rate regulation rather than the benchmark approach with cost-of-service as a secondary approach adopted. As detailed in paragraphs 181-188, the Commission believes that, while there are some advantages to cost-of-service regulation, there are also significant

disadvantages. Another example of alternatives contemplated, but not adopted concerned reduction of cable rates. The Commission in this instance, at paragraphs 1-15, chooses to interpret the Act as intending the regulations to serve not as a check on prospective cable rates, but also as an overall industry-wide rate only reduction. There were also a wide variety of options available in defining effective competition for purposes of rate regulation. These alternatives considered and dismissed are set out in 16-38. In paragraphs 192-197, the Commission determines that a parallel rate regulation scheme for both the basic service and non-basic service tiers would deter cable operators from moving services from the basic tier into non-basic to evade rate regulation. As a final example of an alternative which the Commission reviewed and rejected, we elect to solicit further comment on financial information collection requirements in a future Further Notice of Proposed Rule Making, and thus defer adoption of such a requirement until the comments received in reply have been submitted and reviewed.

B. Initial Regulatory Flexibility Act Analysis
for the Further Notice of Proposed
Rulemaking.

575. Pursuant to Section 603 of the Regulatory Flexibility Act, the Commission has prepared the following initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Further Notice, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of the Further Notice, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq. (1981).

576. Reason for action. The Cable Television Consumer Protection and Competition Act of 1992 requires the Commission to prescribe rules and regulations for determining reasonable rates for basic tier cable service and to establish criteria for identifying unreasonable rates for cable programming services. The Commission has adopted rate regulations that require a comparison to the rate of cable systems subject to effective competition, as defined in the Cable Act of 1992. This Further Notice proposes a comparison to rates of cable systems subject to effective competition, excluding those systems with less than 30 percent market penetration.

577. Objectives. To propose rules to implement Section 623 of the Cable Television Consumer Protection and Competition

Act of 1992. We also desire to adopt rules that will be easily interpreted and readily applicable and, whenever possible, minimize the regulatory burden on affected parties.

578. Legal Basis. Action as proposed for this rulemaking is contained in Sections 4(i), 4(j), 303(r) and 623 of the Communications Act of 1934, as amended.

579. Description, potential impact and number of small entities affected. Until we receive more data, we are unable to estimate the number of small cable systems that would be affected by any of the proposals discussed in the Further Notice of Proposed Rulemaking. We have, however, attempted to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers as required by Section 623(i) of the Cable Act of 1992.

580. Reporting, record keeping and other compliance requirements. The proposals under consideration in this Further Notice of Proposed Rulemaking do not include the possibility of new reporting and record keeping requirements for cable systems.

581. Federal rules which overlap, duplicate or conflict with this rule. None.

582. Any significant alternatives minimizing impact on small entities and consistent with stated objectives. Wherever possible, the Further Notice proposes general rules, or alternative rules for small systems, to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers as required by Section 3(i) of the Cable Act of 1992.

IV. Paperwork Reduction Act

583. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

V. Procedural Provisions

584. For purposes of this non-restricted informal rulemaking proceeding, members of the public are advised that ex parte contacts are permitted from the time of issuance of a notice of proposed rulemaking until the time a draft Order proposing a substantive disposition of the proceeding is placed on the Commission's Open Meeting Agenda. In general, an ex parte presentation is any written or oral communication (other than formal written comments or pleadings and oral arguments) between

a person outside this addresses the merits of the proceeding. Any person who submits a written ex parte presentation addressing matters not fully covered in any written summary must be served on this Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each ex parte presentation discussed above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally Section 1.1231 of the Commission's Rules. 47 C.F.R. §1.1231.

585. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before June 17, 1993, and reply comments on or before July 2, 1993. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments and reply comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street N.W., Washington D.C. 20554.

VI. Ordering Clauses

586. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 303(r), 612(c) and 623 of the Communications Act of 1934, 47 U.S.C. §§ 154 (i), 154 (j), 3030(r), 532 (c), 542(c), 543, NOTICE IS HEREBY GIVEN of proposed amendments to Part 76, in accordance with the proposals, discussions, and statement of issues in this Notice of Proposed Rulemaking, and that COMMENT IS SOUGHT regarding such proposals, discussion, and statement of issues.

587. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 303 (r), 612, 622(c) and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 532, 542(c) and 543, the REPORT AND ORDER IS ADOPTED amending Part 76 of the Commission's rules 47 C.F.R. Part 76, as indicated above and in Appendix C.

588. IT IS FURTHER ORDERED that, the Secretary shall send a copy of this Report and Order, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 et seq. (1981).

589. IT IS FURTHER ORDERED that the requirements and regulations established in this Report and Order shall become effective on June 21, 1993.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Donna R. Searcy
Secretary

APPENDIX A -- EXECUTIVE SUMMARY

APPENDIX A

Cable Rate Regulation Executive Summary

I. Introduction

1. This Report and Order and Further Notice of Proposed Rulemaking amends the Commission's rules to implement Sections 623 (subscriber rate regulation), 612 (commercial leased access), and 622(c) (subscriber bill itemization), of the Communications Act of 1934, as amended by the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992" or "1992 Cable Act").¹ The Report and Order reflects, in large part, the Commission's efforts to ensure that cable subscribers nationwide enjoy the rates that would be charged by cable systems operating in a competitive environment. The Further Notice examines whether the Commission should refine its initial analysis by excluding the rates of cable systems with less than 30 percent penetration from its analysis of systems facing effective competition, even though such systems are defined as systems that face effective competition under the 1992 Cable Act.

2. The Cable Act of 1992 generally provides that where competition is present, cable television rates shall not be subject to regulation by government but shall be regulated by the market. The Act contains a clear and explicit preference for competitive resolution of issues where that is feasible. However, where competition is absent, cable rates are to be regulated to protect the interests of subscribers. This regulation is to be undertaken jointly by the Federal Communications Commission and by state and local governments. Local (or state) governments are primarily responsible for the regulation of rates for programming service and equipment on the basic service tier, and this Commission will entertain complaints against the rates for programming services and equipment for the cable programming services tier or tiers. (Services offered on a per-channel or per-program basis are not subject to rate regulation).

3. The primary results of this proceeding are: 1) development of a process for identifying those situations where effective competition exists (and rate regulation is thus

¹ Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, §§ 3, 9, 14, 106 Stat. 1460 (1992) ("Cable Act of 1992"). The Cable Act of 1992 became law on October 5, 1992. This proceeding was commenced through the issuance of our Notice of Proposed Rule Making in Docket 92-266, 8 FCC Rcd 510 (1992) ("Notice"). The Commission is required to prescribe regulations to carry out its obligations under the rate regulation provisions of the Act within 180 days of the law's enactment.

precluded), 2) establishment of the boundaries between local and state, and federal responsibilities, 3) development of procedural and substantive rules to govern the regulation of basic service tier, cable programming service, and leased channel rates, and 4) creation of a process of gathering information to facilitate the regulation that is being undertaken and periodically review its effectiveness.

4. In the Report and Order, the Commission seeks a comprehensive approach to cable rate regulation that achieves a reasonable balancing of statutory requirements and that will promote the broad policy objectives reflected in the statute. As required by the 1992 Cable Act, it provides for regulation of cable rates by local franchising authorities and the Commission pursuant to jurisdictional and procedural requirements that have been designed to reduce burdens on cable operators, local authorities, the Commission, and consumers. In addition, the requirements that will govern permitted rate levels for cable service and reflect a balancing of the interests of consumers and of cable operators. In this regard, the initial rate regulations should produce substantial savings to consumers on an aggregate industry basis.

These savings will result from rate reductions required from a broad segment of regulated cable operators that service most of the nation's cable subscribers. The required rate reductions should not hinder the ability of the cable industry to continue to provide quality services to consumers. On a going forward basis, price caps for regulated cable systems will reduce administrative burdens and permit the continued growth of services while effectively governing future rate levels.

5. The regulations adopted today may well change over time. In accordance with the statute, the Commission will review and monitor the effect of our initial rate regulations on the cable industry and consumers, and refine and improve our rules as necessary. In addition, it will issue separately a Second Further Notice to obtain a better record for adoption of cost-of-service showings by cable operators seeking to raise rates above capped levels. This step is necessary to assure that the regulations governing such showings will correctly balance the interests of consumers in paying a fair rate and of cable operators in earning a reasonable profit.

II. Report and Order

A. Rate Regulation of Cable Service

1. Rollback of Cable Service Rates

6. The Report and Order finds that Congress was concerned that rates of systems not subject to effective competition reflect undue market power and are unreasonable to the extent they exceed competitive rate levels. This conclusion is

based upon the findings and goals of the Cable Act of 1992, the overall scheme of regulation under it, and the fact that the Commission must consider the rates of systems subject to effective competition in establishing rate regulations. Additionally, the Commission conducted a survey of cable system rates as of September 30, 1992, which revealed that, on average, rates of systems not subject to effective competition are approximately 10 percent higher than rates of comparable systems subject to effective competition, as that term is defined in the statute. Thus, the Commission's survey supports the findings of Congress that current rates for cable systems not subject to effective competition reflect pervasive market power.

7. The Commission concludes, therefore, that its initial effort to regulate rates for cable service should provide for reductions from current rates of cable systems exhibiting undue market power. The Commission's initial implementation of rate regulation of cable service will generally lead to significant reductions from current rate levels for most cable systems. Our approach will enable local franchise authorities to require rates for the basic tier, and the Commission to require rates for cable programming services on the basis of individual complaints, to fall approximately 10 percent, unless the operator is already charging rates that are at the "competitive" benchmark level or it can justify a higher rate from September 30, 1992 levels, based on costs. The Commission estimates that this rollback will affect approximately three-quarters of cable systems, with a total consumer benefit of approximately \$1 billion. Rates of all regulated systems will then be subject to a price cap that will govern the extent to which rates can be raised in the future without a cost-of-service showing. We will also examine systems with rates substantially above the benchmark and will seek to refine the benchmark through further industry surveys.

2. Standards and Procedures for Identifying Cable Systems Not Subject to Effective Competition

a. Application of Effective Competition Tests

8. Cable service and equipment rates may only be regulated under the Cable Consumer Protection and Competition Act of 1992 ("1992 Act") if the cable system is not subject to effective competition. Under the statute, "effective competition" exists if: (a) fewer than 30 percent of households in the franchise area subscribe to the cable service of a cable system; (b) (i) the franchise area is served by at least two unaffiliated multichannel video programming distributors ("multichannel distributors"), each of which offers comparable programming to at least 50 percent of households in the franchise area, and (ii) the number of households subscribing to programming services offered by multichannel distributors other than the largest multichannel distributor exceeds 15 percent of households in the franchise area; or (c) the

franchise authority itself is a multichannel distributor and offers video programming to at least 50 percent of the households in the franchise area.

(1) Multichannel Video Programming Distributor

9. When applying the above definition, multichannel distributors will include cable systems, MMDS operators, SMATV systems, DBS operators, TVRO distributors and video dialtone service providers. We here determine that programmers using leased access channels on cable systems will not be considered multichannel distributors.

(2) Availability of Competing Services

10. A multichannel distributor's service is "offered" in a franchise area if the service is both technically and actually available, with no regulatory, technical or other impediments to households taking service. Service will be deemed to be "technically available" when the multichannel distributor is physically able to deliver the service to a household wishing to subscribe, with only minimal additional investment by the distributor. A service will be considered "actually available" if subscribers in the franchise area are reasonably aware through marketing efforts that the service is available.

(3) Definition of Household

11. We define the term "household" as each separately billed or billable customer, except that we treat individual residences of multiple dwelling units as separate households.

(4) Measurement of Subscribership

12. For purposes of applying the 30 percent threshold in the first effective competition test, the measurement of subscribership will be based on that of the particular system in question, and not an aggregation of all cable systems or competitors in the franchise area. For purposes of applying the 15 percent threshold in the second effective competition test, subscribership of alternative multichannel distributors will be calculated on a cumulative basis; however, only those multichannel distributors that offer programming to at least 50 percent of the households in the franchise area will be included in the 15 percent cumulative measurement.

(5) Program Comparability

13. A multichannel distributor will be deemed to offer "comparable programming" to that provided by a cable system if it offers at least twelve channels of video programming, including at least one nonbroadcast channel.

b. Finding of Effective Competition:

14. For purposes of implementing rate regulation by local franchising authorities, we presume that cable operators are not subject to effective competition. Franchising authorities may rely on this presumption when filing a certification with the Commission to regulate basic rates. The cable operator will then have the burden of rebutting this presumption with evidence demonstrating that effective competition does in fact exist.

15. To ensure that cable operators have access to the data they need to mount a successful challenge to the presumption against effective competition, alternative multichannel distributors will be required to respond, within 15 days, to requests from cable operators for relevant information. Responses by the alternative distributors may be limited to the numerical totals needed to calculate the distributor's reach and penetration in the franchise area.

3. Regulation of the Basic Service Tier

a. Assertion of Jurisdiction over Basic Service and Equipment Rates

(1) Jurisdiction Over Basic Rate Regulation

16. The 1992 Cable Act requires local authorities wishing to regulate basic service and equipment rates to certify in writing to the Commission that (1) its rate regulations will be consistent with the rate regulations we prescribe; (2) it has the legal authority to adopt, and the personnel to administer, rate regulations; and (3) its procedural rules provide an opportunity for consideration of the views of interested parties. Such certification filed with the Commission by a franchising authority will become effective 30 days after filing unless the Commission finds, after notice and a reasonable opportunity to comment, that the franchising authority has not met one of the three criteria above. If the Commission disapproves the certification, the franchising authority will be notified of any revisions or modifications necessary to gain approval. If the Commission disapproves or revokes a certification, we will exercise the franchise authority's regulatory jurisdiction until the authority becomes qualified by filing a new certification that meets the requirements set forth above. Such new certifications become effective upon approval by the Commission, which approval (or disapproval) will be issued within 90 days of filing.

(a) Division of Jurisdiction Between FCC and Local Governments

17. Under the statute, local franchising authorities and the Commission have shared jurisdiction over the regulation of basic service and equipment rates. However, the Commission will not exercise jurisdiction unless either (a) a local franchising authority's certification is denied or revoked, or (b) the franchising authority requests us to regulate basic rates because it has insufficient resources to regulate or it lacks the legal authority to do so. Franchising authorities requesting Commission intervention on the basis of insufficient funds must submit a showing explaining why the franchise fees it obtains cannot be used to cover the cost of rate regulation at the local level. The Commission will not regulate basic rates where a local government voluntarily chooses not to seek certification because it is satisfied with the rates charged by the local cable operator.

(b) Preemption Issues

AA. Preemption of Franchise Agreements

18. All provisions in franchising agreements that prohibit rate regulation by franchise authorities are preempted by the 1992 Cable Act. Regardless of any provision in the franchise agreement, then, a franchising authority may regulate rates for basic service and equipment if the authority meets the certification standards.

BB. Preemption of State Law

19. State laws that preclude rate regulation are not preempted, although in such cases the Commission will assume jurisdiction over basic service and equipment rates. Similarly, state laws that prohibit local governments, but not state governments, from engaging in rate regulation are not preempted; in these cases, basic rate regulation will be conducted at the state level.

(2) The Certification Process

(a) The Certification Form

20. Franchising authorities intending to regulate basic rates must first submit a form certification with the Commission. This form, which will be available from the FCC, will certify that the franchising authority has met the statutory requirements (set forth above) for seeking certification and will further certify that, to the best of the franchising authority's knowledge, effective competition does not exist in the franchise area.

(b) Joint Certification

21. We decide that joint certification for communities served by the same cable system is permitted but not required.

Joint certification for communities served by different systems is also permitted. A state may not file a blanket certification on behalf of its franchising authorities. However, if a state (e.g., a statewide public utilities commission) is the franchising authority, it is entitled to file the certification for itself.

(c) Approval of Certification by the Commission

22. Franchising authorities may begin filing certifications with the Commission 30 days after publication of the Report and Order in the Federal Register, although there is no deadline by which a franchising authority must seek certification. Under the statute, a certification will go into effect in 30 days unless the Commission finds that it is defective. The franchising authority must either mail the form by registered mail, return receipt requested, or hand-deliver the form and obtain a date-stamped copy. The 30-day period will run from the date stamped on the return receipt or copy. However, franchising authorities will not be able to begin regulating rates until they have adopted regulations consistent with those adopted by the Commission in the Report and Order and have implemented rules which give interested parties a reasonable opportunity to comment during the rate regulation process. Franchising authorities have 120 days from the effective date of certification to adopt these rules and regulations.

23. Cable operators may file a petition for reconsideration challenging the franchising authority's certification. Such petitions may be filed any time within the 30-day period after a certification has become effective. An operator filing a petition for reconsideration on the ground that it is subject to effective competition will be granted an automatic stay of rate regulation until resolution of the petition, subject to refund liability back to the date the petition was filed if the Commission subsequently determines that there is no effective competition. Cable operators that file frivolous effective competition petitions to take advantage of the automatic stay provision will be subject to forfeitures.

24. If an operator believes that a franchise authority cannot be certified due to other defects (e.g., it does not have the legal authority, it lacks adequate resources or its rate regulations are not consistent with ours), the operator may file either a petition for reconsideration (which would be filed within 30 days after the certification becomes effective) or a petition for revocation (which could be filed at any time). Operators filing such petitions will not be entitled to an automatic stay of regulation but may request a stay.

25. Where we deny a certification on other than effective competition grounds, the franchising authority will be notified and informed of any modifications that must be made in

order to obtain Commission approval. If, after this opportunity to cure, the authority still fails to meet the certification requirements, its certification will be revoked.

(d) Revocation of Certification

26. We will revoke a franchising authority's certification if, after a reasonable opportunity to comment, it is determined that state and local laws and regulations do not conform to the Commission's rate regulations governing cable rates. A franchising authority's certification may be revoked if, after remand, a franchising authority fails to fulfill one of the three conditions for certification set forth above. In cases of revocation, the Commission will assume jurisdiction over basic service rates until an authority becomes recertified. In those cases remanded back to the franchising authority, an opportunity will be provided to cure defects with directions on how this may be accomplished. Resubmissions will be considered on an expedited basis. A franchising authority's certification will be revoked in these cases only if the authority fails to implement the remand order. While a petition for revocation is pending however, and absent grant of a stay, the franchising authority may continue to regulate the basic service rates of its franchisees.

27. A cable operator once not subject to effective competition that later becomes subject to effective competition, may petition the franchising authority for change in its regulatory status. The operator bears the burden of proving the existence of effective competition. After an initial determination of the franchising authority that effective competition exists becomes final, the franchising authority will then cease regulating basic cable service rates, and the Commission's regulatory authority over cable programming services for the system in the franchise area will also cease. Cable operators denied a change in status by a franchising authority may seek review of that finding at the Commission by filing a petition for revocation. A joint statement may also be submitted by the cable operator and a franchising authority stating that effective competition exists. The joint statement must state which of the three statutory tests for effective competition has been met and explain how the test has been satisfied.

(e) Assumption of Jurisdiction

28. If the Commission denies or revokes a franchising authority's certification, it will exercise the franchising authority's jurisdiction over basic rate regulation until the authority requalifies. Upon denial of or revocation of certification, the Commission will assume jurisdiction and notify the local franchising authority and the cable operator. The notification to the cable operator will require it to file its basic rate schedule with the Commission within 30 days, with a copy

to the local franchising authority. Basic rate filings for existing rates or proposed rate increases for services and equipment (including increases in the baseline channel charge that results in the number of channels in a tier) must be accompanied by the appropriate FCC forms. Cable operators with existing or proposed rates above the permitted tier rate must submit a cost-of-service showing sufficient to support a finding that the rates are reasonable. Until further notice, cost-of-service showings should be made pursuant to the interim standards set forth in this document.

29. The Commission will assume basic rate jurisdiction until the franchising authority files a "petition for recertification" that is subsequently approved. The petition should contain a clear showing, supported by either objectively verifiable data such as a state statute, or affidavit, that the underlying reasons for revocation or denial no longer pertain, and must attach a copy of the earlier decision denying or revoking the original certification.

b. Implementation and Enforcement of Basic Tier Rates

(1) Review by Local Franchising Authorities

(a) Initiation of Basic Cable Rate Review

30. Once a franchising authority has been certified and has adopted the appropriate rules, it must notify the cable operator that these requirements have been met and that it intends to regulate basic service rates. The cable operator will then have 30 days to file its basic rate schedule (and any supporting material concerning the reasonableness of its rates) with the franchising authority.

(b) Franchising Authority Review of Basic Cable Rates

31. A two-step approach will be used regarding franchise authority review of a cable operator's current rates for the basic service tier and accompanying equipment, or proposed increases in those rates. Under the first step, if a franchising authority is able to determine that a cable operator's current rates are within the Commission's reasonable rate standards, the rates could go into effect 30 days after they were submitted. Also, if the franchising authority found that a proposed rate increase was within the Commission's rate standards, the increase could go into effect 30 days after filing with the franchising authority.

32. Under the second step, if the franchising authority is unable to determine whether the rate in issue is within the Commission's reasonable rate standard, based on the material before it, or if the cable operator has submitted a cost-of-service

showing seeking to justify a rate above the Commission's reasonable rate level, the franchising authority may take an additional period of time to make a final determination and toll the effective date of the proposed rates for a commensurate period. A franchising authority may take an additional 90 days if it needs more time to ensure that a rate is within the Commission's rate standard. The authority may take an additional 150 days to evaluate a cost-of-service showing seeking to justify a rate above the reasonable rate level. The authority must issue a brief written decision regarding its invocation of the additional time period. If no action is taken within these time periods, the proposed rates will go into effect, subject to subsequent refund orders if a franchising authority later issues a decision disapproving any portion of the proposed rates.

(c) Due Process Concerns

33. A cable operator is required to notify subscribers in writing of a proposed rate increase at approximately the same time it notifies the franchising authority, i.e., at least 30 days before any proposed increase is effective. An operator, however, will not be required to publish a notice of a proposed rate increase in newspapers or provide information to subscribers regarding how to lodge a complaint. Operators will be required to include in their subscriber notifications the name and address of the local franchising authority, so that the requisite information on complaint procedures can be readily obtained by a subscriber.

34. A franchising authority is required to issue a written decision to the public whenever it disapproves either an initial basic cable rate or a request for an increase in whole or in part, or approves a proposed rate over the objections of interested parties. However, we will not require an authority to issue a written decision if it is approving a basic cable rate or rate increase in its entirety and there have been no objections.

(d) Proprietary Information

35. Franchising authorities have the right to collect information, including proprietary information, in order to make a rate determination in those cases where operators have submitted initial rates or have proposed increases that exceed the Commission's reasonable rate standard. In cases where initial or proposed rates comply with the Commission's rate standard, however, requests for additional information should relate to proper documentation that an operator's prices are in accord with that standard.

(2) Remedies and Appeals

(a) Remedies for Unreasonable Basic Cable Rates

36. Franchising authorities may order prospective rate reductions and, where they have determined that existing or proposed rates are unreasonable, prescribe a reasonable rate.

37. Franchising authorities may also invoke the remedy of ordering refunds in three situations: First, if an operator fails to comply with a rate decision and continues to charge unreasonable rates, the authority can order refunds back to the effective date of its rate order. Second, as part of its initial review of existing cable rates, an authority has the discretion to order refunds for unreasonable rates that exceed the Commission's permitted tier charge and are not supported by a persuasive cost-of-service showing by the operator. Third, if an authority has tolled a proposed rate increase for 90 or 150 additional days and has not completed its review by the end of these time periods, the proposed rates can go into effect subject to a refund if portions of the rates are later found to be unreasonable. For situations two and three above, the refund period is limited to a maximum of one year.

(b) Forum for Appeals of Local Authorities' Decisions

38. The Commission will exercise exclusive jurisdiction over appeals of local rate decisions involving whether the franchising authority has acted inconsistently with the rate regulation provisions of the Cable Act or our implementing rules.

(3) Notification of Availability of the Basic Service Tier

39. Cable operators are required to notify subscribers of the availability of basic tier service within 90 days or three billing cycles from the effective date of the rules adopted in this proceeding and are required to notify new subscribers at the time of installation. Operators who can demonstrate that they have satisfied the notification requirement in the twelve months prior to the effective date of the cable regulations will be exempt from this requirement, provided that their notice conforms to the format and content requirements of our rules.

c. Regulation of Basic Service Tier Rates and Equipment

(1) Components of the Basic Service Tier Subject to Rate Regulation

(a) Introduction and (b) General Requirements

40. The 1992 Cable Act requires cable operators to offer subscribers a separately available basic service tier to which subscription is required for access to any other tier of service. The basic tier must include, at a minimum, all must-carry signals, all PEG channels, and all domestic television signals other than superstations. The cable operator may add other channels of programming to its basic tier at its discretion. The statutory definition preempts provisions in franchise agreements that require additional services to be carried on the basic tier.

(c) Buying-Through Basic Service to Other Tiers

41. Subscribers must purchase the basic service tier in order to gain access to video programming offered on a per-program or per-channel basis. The Report and Order finds that purchase of the basic tier is not required in order to buy non-video programming services such as cable radio.

(d) A Single Basic Tier

42. Cable operators subject to rate regulation may have only one "basic" tier which must be unbundled from all other tiers; multiple basic tiers will not be permitted for rate regulation purposes.

(2) Regulations Governing Rates of the Basic Service Tier

(a) Statutory Standards

43. The Cable Act of 1992 requires the Commission to establish regulations that will assure reasonable rates for the basic service tier, but does not explicitly define "reasonable." Instead, it requires that regulations be designed to achieve statutory goals and take into account the enumerated statutory factors. We conclude that the statute does not require the Commission to place primary weight on any of the statutory factors governing rates for the basic service tier, but that we may do so as part of a reasoned balancing of statutory requirements and factors. Based on statutory findings and goals, as well as results from the Commission's industry survey, we have determined that under the statute the Commission can, and should, place primary weight on the rates of systems subject to effective competition. Accordingly, the Commission's regulations governing rates for the basic service tier are aimed toward achieving rate levels that are closer to rates of systems subject to effective competition.

(b) Benchmarking versus Cost-of-Service Regulation

44. The Commission examines the relative merits of a benchmarking versus a cost-of-service approach as the primary method for regulating rates for the basic service tier. We conclude that we should incorporate a benchmark into our framework for regulation of basic service tier rates because a benchmark can protect consumers from excessive rates and keep the costs of administration and compliance low. The Commission's rules, however, allow cable operators to use cost-of-service principles to justify rates higher than permitted by the system's benchmark.

(c) Local Authority Discretion

45. The Report and Order concludes that local authorities may not elect cost-of-service regulation as their primary mode of regulation of the basic service tier because such an approach would establish a regulatory regime for the basic service tier that is less consistent with Congressional intent than benchmark regulation. Rather, local governments must apply the benchmark system of rate regulation adopted by the Commission, unless a cable operator chooses to make a cost-of-service showing.

(d) Basic Rate Level in Comparison to Other Tiers

46. The Commission declines to adopt a regulatory framework for cable service that seeks lower rates for the basic service tier in comparison to higher tiers. We believe that any advantages in producing a low priced basic tier are outweighed by the incentives for cable operators to reduce offerings on the basic service tier. Accordingly, the Commission establishes a tier neutral framework for rate regulation that applies the same standards of reasonableness to the basic service tier and to cable programming services.

(e) Adoption of a Benchmark to Govern Rates for the Basic Service Tier

AA. The Competitive Benchmark

47. The Report and Order discusses the various benchmark alternatives proposed in the Notice. We find that the Cable Act of 1992 reflects a congressional conclusion that current rates for cable service result, in part, from an ability to raise rates to unreasonable levels because of a lack of effective competition, and that rates are unreasonable to the extent they exceed competitive levels. Our industry survey confirms that rates of systems not subject to effective competition exceed competitive levels by approximately 10 percent on an average industry basis. Based on the statute and the results of the Commission's industry survey, we conclude that the reasonableness of rates of the basic service tier shall be determined by reference to the rates of systems

subject to effective competition. The Commission, therefore, adopts a table of benchmarks based on the average September 30, 1992 rates of systems subject to effective competition.

BB. System Characteristics

48. The Commission applies different benchmark rates to systems based on the individual system's number of channels, subscribers, and satellite signals, but our industry survey does not provide a sufficient basis for identifying other system characteristics that would warrant application of different rate structures. As the Commission gains more experience with cable rate regulation, it may reevaluate this conclusion.

CC. Application of the Benchmark to Determine Initial Regulated Rate Levels

49. The Commission concludes that it will consider reasonable a per channel rate for the basic service tier that is at, or below, the benchmark level when a system becomes subject to regulation. Where a cable system is not charging rates that are above the competitive benchmark we can assume that its rates do not reflect undue market power, even in the absence of effective competition. Therefore, the initial regulated rate for such a system shall be its rate in effect on the date the system becomes subject to regulation, regardless of the amount that rate is below the benchmark.

50. Rates exceeding the applicable benchmark at the time regulation begins are presumptively unreasonable because they exceed the average rate charged by systems subject to effective competition. Some systems with rates at the onset of regulation that are above the benchmark may have had rates that were below the benchmark on September 30, 1992. Such systems are not subject to a rollback from levels in effect on September 30 because the rates were presumptively reasonable on that date. These systems must reduce rates from existing levels to the benchmark, but they may maintain increases from September 30, 1992 levels up to the benchmark and adjust rates to reflect inflation.

51. For a system with basic tier rates above the benchmark both when it becomes subject to regulation and on September 30, 1992, the maximum permitted rate will be the September 30, 1992 rates reduced 10 percent, but no lower than the benchmark rate for that system.

52. Instead of requiring all systems to now reduce rates to benchmark levels, the Commission will take the following steps to address systems with September 30, 1992 rates more than 10 percent above the benchmark: 1) conduct further surveys to refine the competitive benchmark, and further assess the competitive rate

differential between systems subject, and not subject, to effective competition, and to gather cost information; 2) examine in the Further Notice whether the Commission can, or should, exclude from competitive benchmark calculations, systems with less than 30 percent penetration; and 3) carefully scrutinize rates of cable systems that exceed the benchmark by significant amounts even after the 10 percent rollback through cost investigations.

53. The foregoing determinations define the initial permitted rate for the basic service tier when the system becomes subject to regulation. Those systems with initial rates based on adjusted September 30, 1992 rates, may further adjust those rates to reflect inflation occurring between September 30, 1992 and the time when regulation of the basic service tier begins. They must also apply an efficiency adjustment, specified in the rules, to those rates if the total number of subscribers or channels on the system changes between September 30, 1992 and the time of regulation. After those adjustments are made, the initial permitted rate for the basic service tier will then be capped as described in the next section.

(f) Adoption of the Price Cap

AA. In General

54. The Commission adopts a price cap mechanism to assure that future rate increases remain within reasonable bounds. We have found that a price cap approach is an effective alternative to cost-of-service regulation in other regulated areas, and that this approach is consistent with our statutory mandate. At the same time, the Commission has provided for adjustments to the price cap, based on inflation and other factors beyond an operator's control, to assure that the cap does not unduly restrict cable operators' ability to recover costs. The possibility of a cost-of-service showing will also assure that cable operators can recover appropriate costs of service. The price cap rate for the basic service tier will be expressed as a rate per channel to facilitate rate calculations and review.

BB. Application of the Cap to Systems with Current Rates Below the Benchmark

55. The price cap applies to all regulated systems, including those systems with rates that are below the benchmark on the date that regulation commences, unless a cable system justifies higher rates based on cost-of-service principles.

CC. Annual Adjustment Index

56. The Commission establishes an annual adjustment index that permits changes in each system's cap for the basic

service tier based on general changes in the cost of doing business. We adopt the GNP fixed weight price index (GNP-PI) as the annual adjustment index for the cap for basic service tier rates. Under our rules, cable operators may adjust the capped base per channel rate for the basic service tier annually after the final GNP-PI is published by the Department of Commerce for the preceding year. This approach represents the best balance between the administrative burdens imposed by more frequent rate adjustments and the need to permit prompt adjustments for inflation.

(g) External Costs

AA. Retransmission Consent Fees

57. The Commission concludes that retransmission consent costs should be treated as external to the benchmark. However, we are concerned that external treatment during the initial period in which cable operators and broadcasters will establish retransmission consent agreements, may unduly skew incentives away from fair bargaining for reasonable retransmission fees. The Commission believes that a delay in onset of external treatment for retransmission consent fees will serve to protect subscribers from any precipitous increase in rates after October 6, 1993. Hence, we will accord retransmission consent costs external treatment only after October 6, 1994 and only for new or additional fees beyond those already in effect on October 6, 1994. The Commission will also monitor initial retransmission consent agreements and their potential impact on subscribers and may reexamine external treatment if it appears that retransmission consent fees have an unwarranted impact on subscribers.

BB. Other External Costs

58. Programming Costs Other Than Retransmission Consent. The Commission will treat programming cost increases, other than retransmission consent, as external to the benchmark. We will monitor the impact of external treatment of programming cost increases and consider making programming costs subject to the cap if it appears that this treatment is disserving subscribers. The Commission's accounting and cost allocation requirements will determine the share of programming costs to be allocated to the basic service tier. The Report and Order also limits external treatment of programming costs for programming obtained from affiliated entities to the percentage change in the admissions component of the Consumer Price Index between the effective date of the price increase and the date the previous price took effect.

59. Taxes, Franchise Fees, Cost of Franchise Requirements. The Commission also excludes from the cap taxes, franchise fees and the costs of satisfying franchise requirements, including the costs of satisfying franchise requirements for local,

public, educational and governmental (PEG) access channels. The Commission's accounting and cost allocation requirements provide that costs associated with PEG channels carried on the basic tier will be directly assigned to the basic tier where possible and remaining costs will be allocated between tiers in proportion to the number of channels on each tier.

CC. Starting Date for External Treatment

60. For all categories of external costs other than franchise fees, changes in external costs shall be measured from date on which the system becomes subject to regulation, or 180 days from the effective date of our regulations (December 20, 1993), whichever occurs first. Thus, any changes in external costs occurring prior to that date, including from September 30, 1992, will not be accorded external treatment.

61. The industry competitive rate level derived from the Commission's survey data has been adjusted to remove franchise fees. Thus, the Commission permits the total amount of franchise fees to be accorded external treatment at the time the system becomes subject to regulation, rather than only the amount of additional franchise fees incurred after that date.

DD. Limitation on External Treatment for Increases Less Than Inflation

62. For all categories of external costs, other than franchise fees, the Commission permits external treatment for increases in such costs only to the extent that they exceed inflation as measured by the GNP-PI. This requirement does not apply to franchise fees, however, because the benchmark and the Commission prescribed formula for determining the permitted channel rate, are adjusted to exclude franchise fees. Thus, the total amount of increases in franchise fees will be accorded external treatment. Similarly, since the benchmark does not reflect retransmission consent fees, we will accord external treatment to the total amount of retransmission consent fees, after October 4, 1994.

(h) Cost-of-Service Showings

AA. The Opportunity to Justify Rates Above the Cap Based On Costs

63. The Commission has determined that its primary method of regulating cable service rates shall be a price cap mechanism applied to rates determined in relation to the competitive benchmark. However, the starting price cap level is based on industry-wide data and does not necessarily reflect individual systems' costs of providing cable service. Thus, the Commission cannot be certain that the initial capped rate will

permit all cable operators to fully recover the costs of providing basic tier service and to continue to attract capital. Accordingly, a cable operator is permitted to make a cost-of-service showing to determine the reasonable rate for its system. The resulting rate determination will supercede our benchmark/rollback provisions. Thus, an operator may exceed the benchmark or capped rate if it can make the necessary cost showings in certain circumstances. Similarly, however, a cost-of-service determination resulting in a rate below that system's September 30, 1992 rate minus 10 percent will prescribe that system's new rate. The Commission rejects the alternative of not permitting cable operators to exceed the cap unless the rate as applied to them is confiscatory.

BB. Cost-of-Service Standards

64. The Report and Order adopts cost-of-service standards to govern the extent to which cable operators may exceed capped rates for the basic service tier based on costs. In the future, it may be appropriate for local franchising authorities to assume a larger role in setting cost-of-service standards for the basic tier, but the Commission believes that presently these standards should be established at the national level. However, the current record does not contain sufficient information for the Commission to adopt final cost-of-service standards for cable service at this time. Accordingly, a Second Further Notice of Proposed Rulemaking will be issued shortly to seek additional comment on the development of appropriate standards.

65. Pending this rulemaking, which the Commission intends to complete on an expedited basis, cable operators may elect to maintain current above benchmark rates and attempt to justify them in their initial rate filings pursuant to the general principles for cost-of-service regulation. Alternatively, operators may elect to reduce these rates as required by our benchmark regulations. Cable operators that reduce rates in accordance with Commission requirements may seek to raise rates above the cap pursuant to the general procedures the Commission is establishing for cable operators seeking rate increases for the basic service tier. Local authorities (or the Commission in situations where it regulates basic rates) will review cost-of-service showings by cable operators seeking to raise rates above capped levels. Cable operators or subscribers may then appeal the local decision to the Commission. The Commission will review such local decisions on a case-by-case basis pending the cost-of-service rulemaking.

(3) Regulations Governing Rates for Equipment

(a) Equipment Covered